80-854 No.

Supreme Court, U. S.
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In The

Supreme Court of the United States

October Term, 1980

LEONARD J. KERPELMAN,

Petitioner,

vs.

ATTORNEY GRIEVANCE COMMISSION OF MARYLAND,

Respondent.

SUPPLEMENTAL APPENDIX

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TABLE OF CONTENTS
OF SUPPLEMENTAL APPENDIX

Page

Opinion of the Court 1

ATTORNEY GRIEVANCE COMMISSION OF MARYLAND

v.

Leonard Jules KERPELMAN.

Misc. (Subtitle BV) No. 1.

Court of Appeals of Maryland.

Sept. 5, 1980.

Attorney Grievance Commission filed petition praying that disciplinary action be taken against respondent attorney. The Court of Appeals, Smith, J., held that advising client to take possession of child who had been placed in custody of client's former spouse by court order, attempting to charge client more than fee agreed upon and misrepresenting to client status of his case in order to justify improper fee warranted two-year suspension from practice of law for attorney whose prior professional record appeared to be unblemished.

Order accordingly.

1. Attorney and Client ⇐57

In attorney disciplinary action, trial judge's failure to find that attorney misrepresented fee to clients, or improperly prepared certain domestic relations cases for trial, was not clearly erroneous.

2. Jury ⇐19(18)

Right of trial by jury is not applicable to attorney disciplinary proceedings. Const. Declaration of Rights, Art. 5; U.S.C.A. Const. Amend. 5; Maryland Rules, Rule BV10 d.

3. Attorney and Client ⇐57

Attorney who was subject of disciplinary action followed an unacceptable method of procedure in simply asserting, with nothing more, that "Each and every Motion Raising Preliminary Objection made by [him] below should have been granted."

4. Attorney and Client ⇐57

Neither rulings on motions nor evidentiary rulings made in attorney disciplinary proceeding were erroneous; furthermore, respondent attorney should have specified which rulings he excepted to and the grounds of his exceptions.

5. Attorney and Client ⇐54

Judge presiding over attorney disciplinary proceeding sits as Court of Appeals' hearing examiner.

6. Attorney and Client ⇐54

Assuming propriety of a mistrial motion in attorney disciplinary proceeding, no error resulted from denial of attorney's motion.

7. Attorney and Client ⇐53(2)

Fact that only evidence presented against attorney in disciplinary proceeding was testimonial evidence given by complaining witnesses did not preclude finding that there was clear and convincing evidence of misconduct.

8. Attorney and Client ⇐56

Judge who presided over attorney disciplinary proceeding did not err in failing to discuss certain evidence in his opinion.

Opinion

9. Attorney and Client ⇐57

Even if it was error in attorney disciplinary proceeding to admit evidence of an episode which did not form basis of any charges, such error did not constitute basis for rejecting trial judge's findings.

10. Attorney and Client ⇐53(2)

Finding that complaining witness in attorney disciplinary proceeding, who admitted on the stand under oath that he lies when it is to his advantage, was a credible and truthful witness did not constitute error.

11. Attorney and Client ⇐54

Fact that inquiry panel made a formal finding that fees charged by respondent attorney with respect to matters which formed basis of charges in disciplinary proceeding were not excessive did not invalidate other findings relating to fees.

12. Attorney and Client ⇐57

Attorney, who introduced complaining witness' letter into evidence at his disciplinary hearing, could not complain on appeal of its admission.

13. Attorney and Client ⇐57

Trial judge did not improperly make changes in transcript of attorney disciplinary proceeding.

14. Attorney and Client ⇐32

Court of Appeals has power to promulgate rules regarding practice of law.

15. Attorney and Client ⇐53(2)

Findings made in disciplinary proceeding with regard to violation of disciplinary rules were not arbitrary and capricious or

against weight of the evidence. Code of Professional Responsibility, DR1-102(A)(1, 4-6), DR7-102(A)(7).

16. Attorney and Client ⇐38

Disciplinary Rules of Code of Professional Responsibility were applicable to charges of attorney misconduct arising from activities taking place subsequent to 1970.

17. Attorney and Client ⇐46

Even if attorney disciplinary proceeding was financed by an illegal tax on members of legal profession, such fact would not constitute defense to charges of attorney misconduct. Maryland Rules, Rule 1228.

18. Attorney and Client ⇐32

Lawyer may not advise his client to violate a law or court order except in instance of a test case where there is a good-faith belief that statute or order may be invalid. Code of Professional Responsibility, EC7-1 to EC7-3, EC7-5, EC7-22.

19. Attorney and Client ⇐58

Advising client to take possession of child who had been placed in custody of client's former spouse by court order, attempting to charge client more than fee agreed upon and misrepresenting to client status of his case in order to justify improper fee warranted two-year suspension from practice of law for attorney whose prior professional record appeared to be unblemished. Code of Professional Responsibility, DR1-102(A)(1, 4-6), DR7-102(A)(7), DR7-106(a).

Opinion

J. Martin McDonough, Jr., Sp. Asst. Bar Counsel, Baltimore, for Attorney Grievance Commission.

Leonard J. Kerpelman, Baltimore, pro se.

Argued before MURPHY, C. J., and SMITH, DIGGES, ELDRIDGE, COLE, DAVIDSON and RODOWSKY, JJ.

SMITH, Judge.

Pursuant to Maryland Rule BV9, the Attorney Grievance Commission acting through Bar Counsel filed a petition with us praying that disciplinary action be taken against Leonard Jules Kerpelman, a member of the Bar of this State. The complaint grew out of his representation of three individuals. Those relative to one individual ultimately were dropped. The disciplinary rules involved in the two remaining complaints were DR 1-102(A)(1), (4), (5), and (6); 2-106(A); 2-110(A)(2) and (B)(4); 6-101(A)(2) and (3); 7-102(A)(7); and 7-106(A). Pursuant to Rule BV9 b we designated the Honorable Marshall A. Levin, an associate judge of the Eighth Judicial Circuit of Maryland, to hear the charges. After extensive and protracted hearings, he submitted a comprehensive report to us in which he found clear and convincing evidence of violation of DR 1-102(A)(1), (4), (5), and (6); DR 7-102(A)(7); and DR 7-106(A).[1] We agree.

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1. These latter disciplinary rules state in pertinent part:

DR 1-102 Misconduct.

(A) A lawyer shall not:

(Cont'd

Opinion

We shall set forth the charges against Kerpelman together with the gist of the trial judge's findings on those charges. We shall then consider the exceptions of Bar Counsel and each of Kerpelman's forty-four exceptions. Then we shall discuss the applicable law and the appropriate sanction to be imposed. In an effort to provide a clear understanding of this matter, we set forth in an appendix that portion of the trial judge's opinion which concerns the facts adduced before him.

I The Malcomb matter

Bar Counsel alleged that in December 1975 John D. Malcomb sought the professional assistance of Kerpelman in regaining

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(Cont'd)

(1) Violate a Disciplinary Rule.

* * * * * *

(4) Engage in conduct involving dishonesty, fraud, deceit, or misrepresentation.

(5) Engage in conduct that is prejudicial to the administration of justice.

(6) Engage in any other conduct that adversely reflects on his fitness to practice law.

DR 7-102 Representing a Client Within the Bounds of the Law.

(A) In his representation of a client, a lawyer shall not:

* * * * * *

(7) Counsel or assist his client in conduct that the lawyer knows to be illegal or fraudulent.

DR 7-106 Trial Conduct.

(A) A lawyer shall not disregard or advise his client to disregard a standing rule of a tribunal or a ruling of a tribunal made in the course of a proceeding, but he may take appropriate steps in good faith to test the validity of such rule or ruling.

the custody of one of Malcomb's two children (Malcomb's other child then being in his custody); that Malcomb was advised that it would cost him $1,000 plus court costs for Kerpelman to represent him; that on or about December 17, 1975 Malcomb paid Kerpelman $500; that a second $500 was paid before the scheduled hearing on June 8, 1976; that between December 1975 and June 1976 Malcomb advised Kerpelman by letter of the names of witnesses he believed could materially contribute to the case and should be interviewed; that during this period he notified Kerpelman of the facts of the case; that during this same period Kerpelman granted Malcomb only one forty to forty-five minute interview during which time Kerpelman "indicated a lack of familiarity with the facts and issues of the action"; that Kerpelman recommended to Malcomb the hiring of a private social worker to do an investigation of Malcomb for use at the custody hearing at a cost of $350, but, "at the time of trial, after her qualifications were presented to the Court, her report and its conclusions were ruled inadmissible by the Court"; that prior to the date of trial Kerpelman interviewed only one of the witnesses concerning whom Malcomb had previously advised him; that by his interrogation of witnesses at trial Kerpelman "indicated a lack of familiarity with the facts and issues of the action"; that at the conclusion of the custody hearing on June 8, 1976, the chancellor reserved his ruling; that on or about June 23, 1976, Kerpelman "sent a bill to Malcomb for a 'Further retainer' in the amount of $650";

that upon receipt of that bill Malcomb paid Kerpelman $50; that when subsequent to the hearing Malcomb was unsuccessful in making contact with Kerpelman he "contacted his former wife and her attorney, during the week of July 20, 1976, and learned that the Court had reached a decision based upon the hearing of June 8, 1976, which decision Malcomb found acceptable to him, in that one child was awarded to Malcomb, and the other to Malcomb's former wife, with the requirement that Malcomb pay $25 per week in support for the child awarded to his former wife"; that on or about July 27 Malcomb "encountered [Kerpelman] at a meeting of a group called Fathers United, at which time [Kerpelman] indicated to Malcomb that the Court had not yet reached a final determination on the custody issue, and that [Kerpelman] was still working on the matter on Malcomb's behalf"; that on or about July 28, 1976, Malcomb ascertained from the chancellor that he had in fact rendered a decision on the custody issue on July 20, 1976; that Malcomb telephoned Kerpelman on about July 28, 1976, to tell him of the information he had acquired from the trial judge at which time Kerpelman "again told Malcomb that the matter had not been settled;" that on or about July 29, 1976, "Malcomb notified [Kerpelman] by letter that he was terminating their relationship, after which [Kerpelman] continued to correspond with Malcomb, and with the Court on Malcomb's behalf"; that on or about August 26, 1976, Kerpelman "submitted another bill to Malcomb for an additional $1,250, re-

flecting an 'Additional final fee based on successful result,' resulting in a total additional claim of $1,850"; that on or about October 4, 1976, Kerpelman sued Malcomb claiming $1,850 "for services rendered by [Kerpelman]"; that on or about October 29, 1976, Kerpelman "submitted a third additional bill to Malcomb for an additional $1,000 for 'Re-analyzation of file, further additional fee based on time expended,' resulting in a total additional claim of $2,250"; that on or about February 11, 1977, Kerpelman amended his claim for damages in his suit against Malcomb "to $4,262, reflecting a total claim of $5,312, less the $1,050 previously paid by Malcomb"; and on or about March 21, 1977, Kerpelman "submitted a fourth additional bill for $4,262 as a 'Corrected bill based on final analysis done in January, 1977.'"

It was claimed, based on these allegations, that Kerpelman had violated DR 1-102(A)(1), (4), (5), and (6); DR 2-106(A); DR 2-110(A)(2) and (B)(4); and DR 6-101(A)(2) and (3).[2] The charges concerning

---

2. The disciplinary rules here involved which were not quoted in n. 1 state in pertinent part:

DR 2-106 Fees for Legal Services.

(A) A lawyer shall not enter into an agreement for, charge, or collect an illegal or clearly excessive fee.

DR 2-110 Withdrawal from Employment.

(A) In general.

* * * * * * *

(2) In any event, a lawyer shall not withdraw from employment until he has taken reasonable steps to avoid foreseeable prejudice to the rights of his client, including giving due notice to his client, allowing time for employ-

(Cont'd)

neglect and excessive fees ultimately were dropped.

At the conclusion of the hearings the trial judge framed the following as the issues to be determined by him:

1. Did Respondent violate any Disciplinary Rules by making an agreement with Malcomb that his representation of Malcomb would cost $1,000.00 and yet intended, at the time of the agreement, to charge an additional fee based on certain factors, including a successful result?

2. Did he further violate any Disciplinary Rule by allegedly misrepresenting to Malcomb that his case was not yet resolved in the judge's mind until the August 9, 1976 decree was signed and that he was working on the case, when in fact, the judge's ruling was on July 20, 1976

(Cont'd)

ment of other counsel, delivering to the client all papers and property to which the client is entitled, and complying with applicable laws and rules.

* * * * * *

(B) Mandatory withdrawal.

A lawyer representing a client before a tribunal, with its permission if required by its rules, shall withdraw from employment, and a lawyer representing a client in other matters shall withdraw from employment, if:

* * * * * *

(4) He is discharged by his client.

DR 6-101 Failing to Act Competently.

(A) A lawyer shall not:

* * * * * *

(2) Handle a legal matter without preparation adequate in the circumstances.

(3) Neglect a legal matter entrusted to him.

(and the only matter remaining was the drafting and approval of the Order) and respondent was not working on the case at all but rather trying to give the appearance of work in order to exact an improper fee from Malcomb.

3. Did Respondent violate any Disciplinary Rule by furthering a fraud on the court in not advising the court that the Malcomb decree was based on a fraudulent decree, i. e., a backdated separation agreement?

4. Did Respondent violate DR 1-102(A)(5) by his alleged conduct in paragraph 1, 2 and 3 above?

5. Did Respondent violate DR 1-102(A)(6) by maliciously escalating his fee to Malcomb and attempting to obtain improperly an improper fee from Malcomb in the absence of any fee agreement by Malcomb and in the absence of any basis therefor and by using the courts to obtain such improper fee?

6. Did Respondent violate said latter Disciplinary Rule by his alleged conduct in 2 above?

7. Did Respondent violate DR 2-110(A)(2) by improperly withholding Malcomb's papers and the decree after being discharged by Malcomb?

8. Did Respondent violate DR 6-101(A)(2) by lack of adequate preparation in that he conducted no discovery, interviewed no witnesses before trial, called witnesses who were of little or no probative value, failed to call witnesses who

were of probative value and generally displayed no knowledge of the facts surrounding the Malcomb case?

In his consideration of the matter the trial judge lumped together the issues concerning escalation of the fee. He found "by clear and convincing evidence that [Kerpelman] represented to Malcomb that his total fee for his representation in the custody case would be One Thousand Dollars ... and no more but that in violation of his agreement, he charged (or attempted to charge) Malcomb fees over the agreed upon amount; that [Kerpelman] made a wilful misrepresentation to Malcomb as to [Kerpelman's] fee; that [Kerpelman] maliciously and improperly escalated fee charges to Malcomb without any basis, without any agreement, without any warning; and without the escalated charges bearing any relationship to the amount of work done." On the basis of that finding he concluded that Kerpelman violated DR 1-102(A)(4) concerning engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation; DR 1-102(A)(5) concerning engaging in conduct prejudicial to the administration of justice; DR 1-102(A)(6) concerning engaging in other conduct adversely reflecting on his fitness to practice law; and DR 1-102(A)(1) stating that a lawyer shall not violate a disciplinary rule.

On Issue 2 relative to misrepresentation as to whether or not a case had been "resolved in the judge's mind" the trial judge "conclude[d] by clear and convincing evidence that [Kerpelman] deliberately misrep-

resented to Malcomb that there remained work to be done on this . . . case and that . . . [Kerpelman] was actually engaged in performing such work, whereas, after July 20, 1976, there remained no work to be done and [Kerpelman], in fact, performed no work and that this misrepresentation was made to justify an improper fee." Upon this finding he concluded that there was a violation of DR 1–102(A)(4) and DR 1–102(A)(6).

The trial judge said he was "not convinced by clear and convincing evidence that [Kerpelman] furthered a fraud on the court" by "doing nothing to either advise Malcomb or the court of Malcomb's knowing acquiescence in [his former wife's] backdating of their separation agreement . . . ." He likewise found no clear and convincing evidence that Kerpelman violated DR 2–110(A)(2) relative to withdrawal from employment by withholding Malcomb's papers and the decree after being discharged by Malcomb and by continuing to deal with the chancellor after such discharge.

The trial judge likewise found no violation of DR 6–101(A)(2) on the issue of adequate preparation, stating, "What Bar Counsel perceives as inadequacy may well be trial tactics."

II The Draper matter

The petition for disciplinary action alleged that Marlene S. Draper was awarded a divorce a vinculo martrimonii from David W. Draper on or about January 7, 1975, in which she was awarded custody of their child; that in April 1976 Draper sought

Kerpelman's representation of him in an effort to have the decree modified by having custody awarded to him; that Kerpelman advised Draper "that the fee would be $960 plus court costs and that the fee should be paid prior to the date of any hearing on modification"; that Draper paid Kerpelman $500 on or about April 15, 1976; that on or about May 7, 1976, Kerpelman "submitted a bill to Draper in the amount of $10 for 'Filing fee for Petition for Modification of Decree as to Child Custody' "; that on or about May 14, 1976, Kerpelman filed a petition on behalf of Draper in the Circuit Court for Anne Arundel County for modification of the custody decree; that "[d]uring the period April, 1976, to August 21, 1976, [Kerpelman] advised and counseled Draper to take his child from Marlene S. Draper, then living in Syracuse, New York, and further planned with Draper the methods by which he was to obtain the child, notwithstanding the award of custody [in the divorce decree]"; that "[a]cting at the direction of [Kerpelman], on or about August 21, 1976, Draper entered the apartment in which Marlene S. Draper was then living, in Syracuse, New York, and '. . . Took the child *without the permission or consent of Marlene S. Draper* . . .,' returning with the child to Maryland"; that on or about September 7, 1976, Draper forwarded $460 to Kerpelman, being the remainder of the fee to which reference was previously made; that on or about September 30, 1976, the Circuit Court for Anne Arundel County ordered Draper to return the child to Marlene S. Draper "and to show

cause why he should not be found in contempt of that court for his actions [in retrieving the child]"; that on or about March 23, 1977, a hearing was held on Draper's petition for modification of the custody decree, which hearing resulted in an award of custody to Draper; that although Draper "on numerous occasions [requested] an interview in [Kerpelman's] office prior to the hearing of March 23, 1977, [Kerpelman] refused to meet with Draper"; that on or about March 24, 1977, Kerpelman "submitted a bill to Draper for an 'Additional final fee based on fully successful conclusion of case,' in the amount of $850, which amount Draper refused to pay"; that as a result of Draper's refusal to pay this sum of $850 "[Kerpelman] refused, upon Draper's request, to provide Draper with a copy of the Decree of Modification resulting from the hearing of March 23, 1977"; and that Kerpelman withdrew from representation of Draper on or about June 21, 1977, without providing Draper with a copy of the decree of modification. (Emphasis in original.)

Bar Counsel claimed that as a result of his actions Kerpelman had violated DR 1-102(A)(1), (4), (5), and (6); DR 2-106(A); DR 2-110(A)(2); DR 6-101(A)(2) and (3); DR 7-102(A)(7); and DR 7-106(A).[3] The charges relative to excessive fees and neglect ultimately were dropped.

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3. The text of these disciplinary rules will be found in n. 1 and n. 2.

Opinion

At the conclusion of the hearings, the trial judge framed the following as the issues to be determined by him:

1. Did Respondent agree that his representation of Draper would cost "about $1,000.00" at a time when Respondent intended to charge more based on certain factors including a successful result?

2. Did Respondent violate any Disciplinary Rules by advising Draper to retrieve (meaning illegally child snatch) the child from Syracuse, New York in flat violation of an unmodified court decree awarding custody of the child to Draper's former wife (mother of the child)?

3. Did Respondent violate DR 1-102(A)(5) by his alleged conduct in 1 above?

4. Did Respondent violate said latter Disciplinary Rule by his alleged conduct in 2 above?

5. Did Respondent violate DR 1-102(A)(6) by his alleged conduct in 1 above?

6. Did Respondent violate said latter Disciplinary Rule by his alleged conduct in 2 above?

7. Did Respondent violate DR 2-110(A)(2) by allegedly refusing to deliver to Draper, the decree of modification (or copy) of March 23, 1977 (awarding custody to Draper–the result sought by Draper and objective in his hiring Respondent after the modification hearing and after Draper discharged Respondent? Did he

further violate said Disciplinary Rule by not avoiding foreseeable prejudice to Draper before he withdrew his representation of Draper and by doing nothing for Draper in the face of danger of additional litigation?

8. Did Respondent not violate DR 6–101(A)(2) by lack of adequate preparation, in that he never conducted discovery, never interviewed any witnesses nor had in person interviews with Draper?

9. Did Respondent not violate DR 7–102(A)(7) and 7–106(A) by his alleged conduct in 2 above?

The most serious charge against Kerpelman is that he advised a client to take steps to recover his child from the child's mother in New York State when, as Kerpelman knew, the mother had custody pursuant to a decree of one of the courts of this State. Here, as will fully appear by reference to the appendix to this opinion setting forth the findings verbatim, the trial judge found as a fact that Kerpelman "did suggest to his client, in flat violation of the Decree, that he (Draper) physically take the child from the Syracuse residence where she was living with her mother; that it was [Kerpelman's], and not Draper's suggestion; [and] that [Kerpelman] told Draper to not make it look like a breaking and entering but just to get the child . . . ." He found under this issue "by clear and convincing evidence that [Kerpelman's] conduct was in violation of Disciplinary Rules 1–102(A)(1), 1–102(A)(4), 1–102(A)(5) and 1–102(A)(6)"

relative to conduct involving dishonesty, etc., conduct prejudicial to the administration of justice, engaging in other conduct adversely reflecting on his fitness to practice law, and violation of disciplinary rules.

On the issues concerning misrepresentation as to fee, the trial judge said, "Despite all of the highly suspicious circumstances, I cannot find by *clear and convincing evidence* that [Kerpelman] intended to improperly charge a fee to Draper in violation of their fee 'agreement.'" (Emphasis his.) Likewise, on the issue relative to inadequate preparation the trial judge said he could not "find by *clear and convincing* evidence that [Kerpelman's] representation was *so* inadequate as to conclude that he violated DR 6–101(2) [DR 6–101(A)(2)]." (Emphasis his.) His concluding comment on this issue was, "In sum, while [Kerpelman's] representation was spotty and somewhat deficient, this court cannot find by *clear and convincing evidence* that [Kerpelman] handled the Draper case without preparation adequate in the circumstances." (Emphasis his.)

III Bar Counsel's exceptions

[1] Bar Counsel has excepted to the failure of the trial judge to find inadequate preparation in both the Draper and Malcomb matters and his failure to find that Kerpelman misrepresented the matter of his fee in the Draper matter. The trial judge saw and heard the witnesses. We did not. Our consideration of the exception for that reason must be similar to that where an action has been tried by the lower court

without a jury. In that circumstance Maryland Rule 886 provides that "the judgment of the lower court will not be set aside on the evidence unless clearly erroneous and due regard will be given to the opportunity of the lower court to judge the credibility of the witnesses." In fact, in *Bar Ass'n v. Marshall*, 269 Md. 510, 516, 307 A.2d 677 (1973), Judge Digges observed for the Court that in a disciplinary case, referring to findings by a trial judge, "[T]he master's findings of fact from the evidence are prima facie correct and they will not be disturbed unless determined to be clearly erroneous." In *Moran v. Moran*, 219 Md. 399, 149 A.2d 399 (1959), we held that evidence should *not* have persuaded a trier of fact to a given conclusion warranting relief. Here we are requested to hold that evidence *should* have persuaded a trier of fact that certain violations existed. There is a substantial difference between the two propositions.

In *Racine v. Wheeler*, 245 Md. 139, 144, 225 A.2d 444 (1967), Judge McWilliams said for the Court, "Since the jury is free to believe only a portion of the evidence of each side the synthesis apparently accomplished by the jury is simply a manifestation of its obvious function." This comment continues to have viability. We have said this is no less true when a judge is the trier of fact. *Clemson v. Butler Aviation*, 266 Md. 666, 672, 296 A.2d 419 (1972), and *Davidson v. Katz*, 254 Md. 69, 80, 255 A.2d 49 (1969). The burden of proof was on Bar Counsel. On this record we cannot say that the trial judge was clearly in error when,

after considering all of the evidence, he was not convinced that Kerpelman misrepresented the fee to Draper or that Kerpelman failed to prepare properly the Draper and Malcomb cases for trial. As we observed in *Eidelman v. Walker & Dunlop*, 265 Md. 538, 545, 290 A.2d 780 (1972), and repeated in *Phelps v. Goldberg*, 270 Md. 694, 707, 313 A.2d 683 (1974), "For many years juries have been instructed at the request of defense counsel to the effect that if the evidence on a given proposition left their minds in a state of even balance or equipoise, then their verdict should be for the defendant because the plaintiff had not met his burden of proof.... A judge sitting as a trier of fact is not expected to go further in reaching a conclusion from the evidence before him than a jury." Certainly, where the burden is to produce clear and convincing evidence (a greater burden than in the ordinary civil case), the principle is no less applicable.

IV Kerpelman's exceptions

1–Right of trial by jury

[2] Kerpelman claims that "[h]e was denied the right to the interposition of a jury at any stage in the proceedings, either as trier of fact or as trier of fact and in law, and claims he is entitled to both." As with virtually all of his exceptions, he does not cite any cases or other authority in support of his claim nor does he specify from whence comes the right.

We assume that the right claimed to have been abridged is the one guaranteed by

Maryland Declaration of Rights Art. 5. This is reinforced by a purported election for jury trial filed in the trial court in which Kerpelman said, "That, said case being quasi–criminal in nature, the defendant further demands that all matters both of law and fact be submitted to the jury for its determination, as provided by the Constitution of the State of Maryland." In *Maryland St. Bar Ass'n v. Sugarman*, 273 Md. 306, 318, 329 A.2d 1 (1974), *cert. denied*, 420 U.S. 974, 95 S.Ct. 1397, 43 L.Ed.2d 654 (1975), we held that a disciplinary action against an attorney does not involve a criminal or quasi–criminal sanction within the purview of the Fifth Amendment to the Constitution of the United States.

Maryland Declaration of Rights Art. 5 states in pertinent part, "That the Inhabitants of Maryland are entitled to the Common Law of England, and the trial by Jury, according to the course of that Law ...." In *Knee v. City Pass. Ry. Co.*, 87 Md. 623, 624, 40 A. 890 (1898), Judge Pearce referred to this provision and said for the Court, "Language of similar import, is found in the Constitution of each of the United States, and the authorities are therefore naturally uniform to the effect, that it is the historical trial by jury, as it existed when the constitution of the state was first adopted, to which the inhabitants of each state are entitled ...." Maryland Rule BV10 d concerning hearing of disciplinary charges states, "The hearing of charges is governed by the same rules of law, evidence and procedure as are applicable to the trial of civil proceedings in equity." Civil pro-

ceedings in equity are not heard by juries nor were they at the time of the adoption of the Constitution of 1776. At one time we did have a statutory procedure in Maryland for sending issues from a court of equity to a court of law for determination by a jury. This no longer prevails. The Maryland authority, E. Miller, *Equity Procedure in Maryland* § 232 (1897), states, "An issue of fact to be tried by a jury is not a matter of right, at any stage of the proceedings, independently of statute ...." *Id.* 290–91. Thus, it follows that lawyer disciplinary proceedings are not required by the Constitution of Maryland to be heard by juries.

Even were there no provision in our rules to the effect that the proceedings should be conducted as in equity, disciplinary proceedings against attorneys, in the absence of a rule or statute providing to the contrary, are not encompassed within the constitutional guarantees of trial by a jury, be that guarantee state or federal. *Ex parte Wall*, 107 U.S. 265, 288–89, 27 L.Ed. 552, 2 S.Ct. 569 (1883); *Ex parte Burr*, 4 F.Cas. 791,796, 1 Wheeler, *Crim.Cas.* 503, 519–20, 2 Cranch C.C. 379, 390–91 (D.C. Cir. 1823) *aff'd* 22 U.S. (9 Wheat.) 529, 6 L.Ed. 152 (1824); *Ex parte Thompson*, 228 Ala. 113, 152 So. 229 (1933), and 7 Am.Jur.2d *Attorneys at Law* § 90 (1980). *Thompson* contains an excellent analysis of the matter and reviews decisions in numerous jurisdictions upon the subject. This contention is without merit.

2–Motions raising preliminary objection

[3] Kerpelman says, "Each and every Motion Raising Preliminary Objection made by [him] below should have been granted."

He adds no more. This is not an acceptable method of procedure. *See, e. g., Dean v. Redmiles*, 280 Md. 137, 169–70, 374 A.2d 329 (1977), and *State Roads Comm. v. Halle*, 228 Md. 24, 178 A.2d 319 (1962). In the latter case Judge Prescott said for the Court:

> Under its "Statement of Facts" in its brief, appellant alleges that, "both real estate witnesses [of the appellees] Jones and McCurdy, over objection, subtracted from their after value the sewer deficits computed by the witness Matz," without reference to the record extract wherein the witnesses testified as alleged, or the objections were made. Still under the same heading, it then alleges, "appellant moved that * * * that part of the real estate witnesses' testimony concerning sewer deficits be stricken, which motion was denied (E. 259–260)." The record sustains the fact that this motion was made and denied.
>
> But neither under this heading nor the heading of "Argument" in its brief does it present any argument in support of its contention on this point, nor do the appellees deal specifically with the question. Under these circumstances, we conclude the point has been waived. Maryland Rule 831 c 4; cf. *Fid. & Dep. Co. v. Mattingly Lumber Co.*, 176 Md. 217, 220, 4 A.2d 447; *Comptroller v. Aerial Products*, 210 Md. 627, 644, 124 A.2d 805. Surely it is not incumbent upon this Court, merely because a point is mentioned as being objectionable at some point in a party's brief, to scan the entire record and ascertain if there be any

ground, or grounds, to sustain the objectionable feature suggested. [*Id.* 31–32, 178 A.2d 323.]

We have examined the motions raising preliminary objection, however, and find no error in their denial.

3–Rulings on evidence

[4] Kerpelman, "excepts to the myriad rulings made by [Judge] Levin below on [Kerpelman's] objections to the introduction of evidence, and to each such ruling, and he makes each such ruling ground for exceptions to the acceptance of the findings which were made." That which we have just quoted from *Halle* is applicable here. Surely, it is not incumbent upon us to comb a transcript covering hearings approximately four weeks in length to find "the myriad rulings . . . on . . . objections to the introduction of evidence" when the experienced attorney involved does not see fit to specify to which rulings on the evidence he takes exception nor to state the basis of his objections. In our examination of the transcript, however, we have discovered no errors.

4–Rulings on motions

Kerpelman "excepts to the various rulings on motions which were made against him in the hearing below and he makes each such erroneous ruling the ground of an exception to the acceptance of the findings made." Again, he has failed to be more specific. We have found no errors in our examination of the record.

Opinion

5–Motions for mistrial

Numerous motions for mistrial were made during the course of the hearings. On this issue Kerpelman says he excepts "particularly [to] the failure to grant each and every specific motion or request for mistrial which was made below; he makes each of the said failures, which number approximately thirty or more the basis of an exception and says that each of the motions or requests for mistrial was well made or well taken and that for the failure to grant any, the findings made below should be dismissed."

[5, 6] It must be remembered that a trial judge in the position of Judge Levin in this case sits as our hearing examiner. *Attorney Griev. Comm. v. Bailey*, 285 Md. 631, 637, 403 A.2d 1261 (1979), and *Bar Ass'n v. Marshall, supra*, 269 Md. at 515–16, 307 A.2d 677. We note that Kerpelman has failed to be specific even as to the number of motions for mistrial he made. Assuming, arguendo, that such a motion is proper in this type of proceedings, from our examination of the record we find no error on the part of Judge Levin. Rather, we believe Judge Levin is entitled to commendation for his patient, courteous handling of a difficult proceeding.

6–9, inclusive–Further rulings on evidence

Kerpelman has excepted to the trial judge's "failure to permit testimony as to [Kerpelman's] ordinary practice as concerns fees," his "failure to permit witnesses called by [Kerpelman] to testify thereto referring

to [the practice concerning fees]," his "failure to permit other witnesses called by [Kerpelman] to testify," and "[t]he limitation on the number of character witnesses called by [Kerpelman]." Again, we find a lack of specificity. Although we permitted Kerpelman to file a revised brief subsequent to the argument is this matter, that rambling, forty-page document does not address this or many other points raised by the exceptions.

We have observed many times that the reception of evidence is to a large degree entrusted to the discretion of the trial court and its action will seldom constitute grounds for reversal. *See, generally, e. g., State v. Conn.*, 286 Md. 406, 425, 408 A.2d 700 (1979); *Impala Platinum v. Impala Sales*, 283 Md. 296, 332, 389 A.2d 887 (1978); *Radman v. Harold*, 279 Md. 167, 173, 367 A.2d 472 (1977); *Andrews v. Andrews*, 242 Md. 143, 152, 218 A.2d 194 (1966); *Smith v. State Roads Comm.*, 240 Md. 525, 214 A.2d 792 (1965); *Sanner v. Guard*, 236 Md. 271, 277, 203 A.2d 885 (1964); *Turner v. State Roads Comm.*, 213 Md. 428, 434, 132 A.2d 455 (1957); *Reid v. Humphreys*, 210 Md. 178, 185, 122 A.2d 756 (1956); *Barranco v. Kostens*, 189 Md. 94, 97, 54 A.2d 326 (1947); *Zeller v. Mayson*, 168 Md. 663, 667, 668, 669, 179 A. 179 (1935); *Ice Machinery Corp. v. Sachs*, 167 Md. 113, 126, 173 A. 240 (1934); and *Maryland Electric Ry. v. Beasley*, 117 Md. 270, 277, 83 A. 157 (1912). We find no error in this case.

10–16, inclusive–Alleged bias, prejudice, etc., of Judge Levin

These contentions are without merit.

17 and 18–Weight of the evidence

[7] In his seventeenth exception Kerpelman attacks the weight given to certain of the evidence, saying it "could not possibly have been 'clear and convincing' . . . ." We perceive no error.

In his eighteenth exception he suggests, "As a matter of law an attorney cannot be found to have erred by 'clear and convincing evidence' when the only evidence in the case is the testimonial evidence, as here, of the complaining witnesses in the two separate cases."

We recently had occasion in *Berkey v. Delia*, 287 Md. 302, 413 A.2d 170 (1980), to discuss clear and convincing evidence under the rule enunciated relative to libel and slander actions in *New York Times Co. v. Sullivan*, 376 U.S. 254, 84 S.Ct. 710, 11 L.Ed.2d 686 (1964). We said:

> The fact that this is a "one on one" situation in no way precludes a determination by clear and convincing evidence as to which is speaking truthfully. That this is so is readily understood when we point out that in a criminal case an individual may be convicted upon the testimony of one witness who says that he saw the accused do the act constituting the crime notwithstanding the fact that the accused may say that he was not even present at the scene of the crime. Proof beyond a reasonable doubt, required in criminal cases, is a higher standard than proof by clear and convincing evidence required in a defamation case such as

this. [*Id.* at 330, 413 A.2d at 183.]

We point out that in *Caviness v. State*, 244 Md. 575, 224 A.2d 417 (1966), Judge Marbury said for the Court:

> We have held that the testimony of one eye witness, if believed, is sufficient to convict, *Turner v. State*, 242 Md. 408, 219 A.2d 39· *Hammond v. State*, 241 Md. 733, 217 A.2d 569; and *Wesbecker v. State*, 240 Md. 41, 212 A.2d 737. The trial court in a non-jury case is entitled to believe the identifying witness rather than alibi witnesses who place appellant elsewhere. *Campbell v. State*, 231 Md. 21, 188 A.2d 282; Rule 886 a. [*Id.* at 579, 224 A.2d at 419.]

This contention of Kerpelman is without merit.

19 and 20–Failure of the judge "to consider or discuss" certain evidence

[8] The opinion of the trial judge here covered eighty-five pages with more than eighteen additional pages of footnotes appended. The fact that certain evidence is not discussed in an opinion, even one as long as the one here before us, certainly does not indicate that there was a failure to consider any given evidence. It surely is not incumbent upon a judge in any case to discuss every piece of evidence presented. We perceived no error.

21–Admission of testimony of Mr. Brecka

[9] Kerpelman claims error in "[t]he admission of evidence of a collateral issue, that is the Brecka episode, and the admission of any of [Brecka's] testimony . . . ."

Kerpelman testified as part of his case;

A. When you have performed a child snatch, as any number of my clients on my advice have done, this also coming into play in showing that these statements are not, I believe, really inconsistent.

First of all, the use of the word "child snatch" was perhaps an unfortunate choice of words. I have for a long time regularly had occasion to advise fathers in the throes of a marital dispute, that in the absence of a court order, they can have an equal right to possession of the child and to obtain possession of the child. And this is a very vexed subject which is directly discussed in the meetings and legal clinics of Fathers United for Equal Rights.

And in the course of these many discussions at these legal clinics, the term "child snatch" has apparently come to be used to describe getting your child under circumstances which certainly can be valid circumstances. I *never* advised, never to the best of my recollection, advised a client to do that if there is a court order. [Emphasis added.]

This exception is based upon the fact that Bar Counsel later produced William Brecka as a witness. He testified relative to conversations with Kerpelman prior to the incident with which we are here involved:

A. The second conversation I had with him on the telephone when he asked—when he told me that I have to have a check for $950.00 or $850.00 and I have to

> be willing to do anything that was necessary to get custody of the children and I asked him what he meant by that and he kept avoiding the answer "well, just whatever is necessary," and he went on in that vein for a couple of more times and I decided well, I guess I am not going to get an answer here. It was at then the next time I met him was at a Father's United Meeting. After the meeting, outside the meeting room I got him alone at the top of the stairway and I said, "Now, what exactly do you mean by anything necessary to get the children" and he said, "Look," he said, "I will deny it if I am asked, but you have to get the children and keep the children and go as far away as possible and stay away as long as possible." That was the end of that conversation.

In his opinion, which we have reproduced in the appendix, Judge Levin dealt at some length with the admissibility of this testimony. He concluded by stating:

> The Brecka testimony was admitted solely for the purpose of credibility and has not been considered substantively. Finally, the evidence against Respondent is so overwhelming otherwise, that even if the Brecka testimony were inadmissible, it would make no difference at all.

We have heretofore pointed out the wide discretion with which a trial judge is vested in the matter of admission of evidence. Even if there were error here, which we certainly do not hold, the concluding statement by Judge Levin makes plain that such error would not be a basis for our rejecting his findings.

Opinion

22 and 28–Malcomb as a credible witness

[10] In his twenty–second exception Kerpelman took issue with "[Judge] Levin's 'finding' that Malcomb was both a 'credible' and 'truthful' witness, when Malcomb admitted on the stand under oath that he lies 'when it is to his advantage'."

In his twenty–eighth exception Kerpelman said:

> It is explicitly stated in the Record that Malcomb, by admission, "Lies when it is to his advantage"; the testimony of such a witness cannot, as a matter of law, amount to "clear and convincing evidence" in disciplinary charges against an attorney.

It was for Judge Levin to weigh all of the evidence. He saw and heard this witness. We have no reason to believe that he failed to weigh this statement of Malcomb in his determination of credibility. We perceive no error.

23 and 24–The Malcomb fee

Kerpelman states:

> 23. No charge was originally made as to any "excessive fee", but this sort of charge, apparently out of deference to More Important members of the bar than the Respondent was carefully avoided, but in fact, that is all that the charge concerning Malcomb amounts to by any clear and convincing evidence.
>
> 24. The Inquiry Panel made a formal finding that "no excessive fees were charged" and therefore each and every finding in any way related to fees should

be rejected, (a) as a general matter of Due Process, (b) as a general matter of evidence and weight of evidence, (c) as a matter which was not properly charged against the Respondent, (d) as a new charge which the Respondent was not informed of and would not have known of before the hearing.

[11] Throughout this proceeding Kerpelman has attempted unsuccessfully to portray himself as a victim of some sort of conspiracy on the part of "rich" lawyers in large firms.

As Judge Levin pointed out, on June 15, 1979, prior to the trial of this case on its merits, Bar Counsel withdrew the charges of violations of DR 2-106(A) (clearly excessive fee) in the relations of Kerpelman to Malcomb and Draper. We find this exception to be without merit.

25 and 26–Allegations that Judge Levin "consciously, maliciously, and deviously misled this Court" and "distort[ed] the Record"

These exceptions are so frivolous as to be unworthy of comment.

27, 29, and 30–Draper as under the influence of cocaine

Kerpelman says in these exceptions:

27. As to Draper, the Record contains a clear inference that he was under the influence of cocaine when he testified before Levin; as a matter of law an attorney cannot be found guilty for a disciplinary violation upon the testimony of one under the influence of cocaine.

29. The witness Draper testified in the case, and then after suspicions were aroused on the part of the Respondent, an Interrogatory was submitted to him asking whether he was on cocaine at the time he testified. Draper took the Fifth Amendment. Levin refused to strike the testimony. Levin accepted the word of Draper as to what had happened over the word of Kerpelman. This exception is that as a matter of law an attorney may not be found guilty under a "clear and convincing proof" test where the only evidence against the attorney is the uncorroborated testimony of a person who took the Fifth Amendment as to whether he was under the influence of cocaine when he testified.

30. The averments of exception 29 are hereby adopted by reference; Levin's refusal to strike Draper's testimony was severe and substantial error.

He fails to point out the portion of the record from which one might perceive this clear inference. As Bar Counsel puts it, Kerpelman "builds his case for the lack of competence of Draper upon his own suggestions and innuendoes, which are devoid of proof." We agree. Draper testified on June 18, 1979. If in fact Kerpelman at that time had information that Draper was under the influence of cocaine while testifying, that information should have been brought to the attention of the trial judge then. This allegation was presented to the trial judge at the last hearing in this matter in September 1979. Thus, it was clearly before the trial judge when he evaluated

the evidence adduced. He is not clearly in error in his evaluation.

31–Admission of evidence as to Kerpelman's "further[ing] fraud on the Court"

This exception in its entirety reads:

Levin erroneously admitted evidence concerning Respondent's "further(ing) fraud on the Court" (See page 67 of Levin's opinion) although the Respondent was not charged with this. This was the material relating to Malcomb having committed perjury in obtaining his original divorce by stating that the separation took place before the date when it actually did.

This was another side issue brought in by Levin, it obviously colored his decision although he did not make a finding of guilty on this matter, but the admission of this evidence must have been prejudicial. See *Bar Association v. Cockrell*, 270 Md. 686, 313 A.2d 816 (1974) holding that the charges must be "sufficiently clear and specific" so as to make the attorney aware of what he is compelled to answer for and defend against. At no time prior to the admission of this evidence by Levin had Kerpelman been charged with anything having to do with this backdating, which occurred long before Kerpelman was representing Malcomb. It was sprung on Kerpelman for the first time in the midst of the trial.

This is a false issue, to put it mildly. We have already quoted from Judge Levin's opinion (without specifying, however, that

he said it on page 67) to the effect that on the issue of backdating of the separation agreement he was "not convinced by clear and convincing evidence that [Kerpelman] furthered a fraud on the court." He also said in that opinion:

> Respondent tried to exploit the fact that Malcomb accommodated [his former wife] when she "backdated" their separation agreement one month. This was mendacious conduct on Malcomb's part and Respondent excoriated Malcomb. However, by the same token, Respondent too knew that the March 29, 1974 agreement was based upon a fraudulent date and he too did the same thing as Malcomb–he kept quiet. His testimony concerning this inaction is evasive and unconvincing. Apart from this, I find Malcomb's testimony truthful and credible.

Kerpelman began his cross–examination of Malcomb on June 19. When court reconvened on June 21 other witnesses were put on the stand as an accommodation to various persons. Then Malcomb resumed the stand for further cross–examination. The first question propounded by Mr. Kerpelman to Malcomb was whether he had "ever lied to get a desired result in an important matter." After a response that he was unaware of having done so, Kerpelman showed him a letter from Malcomb to Kerpelman dated May 5, 1976. Then the record reflects:

> MR. KERPELMAN: Now, if Your Honor please, I feel that, perhaps, it is incumbent on me to suggest to the wit-

> ness that he has a right, I believe, not to answer under the Fifth Amendment to the United States Constitution. Shall I advise him on that?

A lengthy discussion then ensued. Ultimately a copy of the letter in question was made and delivered, with her husband's consent, to Mrs. Malcomb in order that she might consult an attorney on his behalf. When court resumed that afternoon it was brought out that after consultation with his attorney Malcomb had no objection to testifying. The letter in question was shown to Malcomb. After Malcomb's identification, it was admitted into evidence upon Kerpelman's motion as "Respondent's Exhibit No. 5." The first paragraph of the letter states:

> At the time my former wife and I signed our separation agreement, she requested that I agree that the separation actually had taken place the previous February rather than in March. She seemed very anxious that I do this, so I agreed. This obtained the divorce one month sooner than would otherwise have been possible.

[12] Having himself introduced the letter into evidence, Kerpelman cannot now be heard to complain relative to its admission. Moreover, as Kerpelman concedes, the trial judge did not find clear and convincing evidence to indicate that Kerpelman had furthered a fraud on the court.

32–Judge Levin's alleged "clear and absolute error of law" relative to Kerpelman's fee dispute with Malcomb

In this exception Kerpelman states:

32. Levin committed a clear and absolute error of law in coming to his conclusion that Malcomb had been overcharged. At page 63 of Levin's opinion he referred to the Respondent's continuing to contend, to argue, in Malcomb's behalf, upon the question of whether Malcomb should pay support when one child was awarded to him and one child was awarded to the mother. Levin states the question was *not* still open. [(Emphasis in original.)]

At page 64 of his opinion Levin, with emphasis, states:

> "Despite Merle's (the mother's) earning *capacity* (she was *not* then employed) and marriage, it was decidedly unrealistic to expect any court to not require a father (earning near $22,000 per year–as per Malcomb's Answer 3 to Merle's Interrogatory–as prepared by Respondent) to pay something for the support of his child."

This is a complete and total misstatement of the law as it existed at the time in question, which was 1976. At that time the law was enunciated in the case of *Hare v. Hare*, a *per curiam* decision filed February 22, 1974, No. 443, September Term, 1973. This is an unreported decision and it is not referred to here as a citation. Rather, it is referred to to show what the Court of Special Appeals itself has said the law was at that time, and because reference to it was part of the trial testimony. The *unrefuted*, uncontradicted, evidence in the case before Le-

vin *was* that this was the law at that time. The Respondent specifically so testified. But no, Levin takes matters into his own hands and states the law *another* way, and erroneously. At page 7 of the *Hare* opinion it is stated:

> "The amount of support each will be required to provide is to be determined by an evaluation of each party's relative financial status, work history and *earning capacity*." (Emph. supp.)

Thus Levin's finding was clearly erroneous as a matter of law.

A copy of *Hare v. Hare* is attached hereto.

The *Hare v. Hare* test of *earning capacity* was not changed until *Rand v. Rand*, [280 Md. 508,] 374 A.2d 900 [(1977)], wherein, in 1979 [sic], the court seems to have changed the test to something else. But the rule set forth in *Hare* is the rule as it existed at the time in question.

Kerpelman testified in the case below that this was the law and there was no contradiction. Nor can any citation be produced against this proposition. Kerpelman testified that he had this above quoted passage memorized and it was the test in all of his cases at that time.

It is also pointed out that the testimony was that the mother was married to a spouse who was earning around $30,000 per year, and therefore had negligible or no overheard expenses of her own, so that whatever money or earning capacity she had, was entirely available for the support of the child in question. [Emphasis in original.]

Opinion

What Judge Levin said on page 63 of his opinion was:

> It is undisputed that Respondent never discussed any of his escalating bills with Malcomb beginning with the Six Hundred Fifty Dollar ($650.00) bill. He simply sent them to Malcomb. As to Respondent's August 26, 1976 bill of One Thousand Two Hundred Fifty Dollars ... ("Additional final fee based on successful result,") if the July 20, 1976 conference (at 2:00 P.M. with Judge MacDaniel left matters so up in the air as Respondent contended ("subject to all sorts of wavering winds of change ... open at that time, was the question of whether Malcomb should pay support, it was still open to contest"), why would Respondent charge Malcomb an additional fee for "successful result?" According to Respondent, he felt that the July 20, 1976 decision reached by Judge MacDaniel (requiring Malcomb to pay Twenty-five Dollars ... per week as support for Heather) was "unreasonable and unfair" and felt it would be "preferable to have a formal hearing." Obviously, in Respondent's mind, this could not be called a "successful result" under such unfair circumstances even if Malcomb did retain Kirsten (whom he had before Respondent came to represent him).

The quotation by Judge Levin on page 63 concerning "subject to all sorts of wavering winds of change," etc., was from Kerpelman's response to Bar Counsel's demand for admission of relevant facts. The demand was that Kerpelman admit that "in [a] tele-

phone call [previously referred to in the demands he] advised John D. Malcomb that the 'custody matter,' referring to the decision in the case of *Malcomb v. Malcomb*, Equity No. 78654, was not yet settled." Kerpelman denied the statement, saying he "ha[d] no recollection as to this but by virtue of the fact situation, [it was] quite unlikely that this would have been stated," adding that "the question [was] designed as a conscious trap for the tryer [sic] of fact in this case." He then went on to claim "that custody matters and in fact all equity matters are in fact still open until decree is signed." He then made the other statements quoted by Judge Levin.

We agree with Judge Levin that under the law as it has existed and continues to exist it is unrealistic to expect a court not to require a father earning $22,000 per year to pay *something* for the support of his child.

Kerpelman is in error when he suggests that the trial judge came to a "conclusion that Malcomb had been overcharged." He reached no such conclusion. He determined, as we have earlier indicated, that Kerpelman represented to Malcomb that his total fee for representation would be $1,000.00 and no more, but that in violation of this agreement Kerpelman charged or attempted to charge Malcomb fees over and above the agreed upon amount, that Kerpelman made a wilful misrepresentation to Malcomb as to the fee, and that Kerpelman maliciously and improperly escalated the fee charges to Malcomb without any basis,

without any agreement, without any warning and without the escalated charges bearing any relationship to the amount of work done.

33–Changes in transcript

[13] In this exception Kerpelman states:

> 33. Levin has freely, and over objection of the Respondent, made numerous changes in the transcript. These objections appear in the file in the form of letters [sic] from the Respondent. Levin was not authorized by law, and it is unlawful for him to make such changes. He was requested by the Respondent to, at best, make changes by striking through but leaving, the old material so that it could still be seen as part of the record. This too, he refused to do.

Again, Kerpelman neither gives the specifics of his allegations nor cites authority for his position.

The trial judge patiently went over the transcripts. He wrote to the court reporters involved indicating that he wished to bring to their "attention certain errors [he] perceive[d]." He said these corrections were "very minor but [he] fe[lt] that the official transcript should reflect accurately what was actually said." In each instance he said:

> If you do not tell me you disagree with the within by January 9, 1980 (either in writing or verbally), then I will assume that as far as you are concerned, I may correct the official transcripts according-

ly. I am sending a copy of this letter to Bar Counsel and Respondent and if they do not object (in writing) on or before January 16, 1980, then I shall actually correct the official transcripts accordingly. If either does so object, in writing before January 16, 1980, I shall set in this matter for hearing promptly.

One stenographer stood by his record as to one entry. As to another where the trial judge thought the word "other" should be "none" the stenographer believed it should be "more." Neither Bar Counsel nor Kerpelman filed objections within the time specified.

There are two letters in the file from Kerpelman *after* the deadline set in Judge Levin's letters. One such letter, which hardly can be called an objection, is dated February 1, 1980. It states:

Citizen Marshall A. Levin
Criminal Courts Building
Courthouse
Baltimore, Maryland 21202

RE: Attorney Grievance Commission v. Kerpelman Misc. Docket (Subtitle BV) No. 1, Sept. Term 1979

Citizen Levin:

I have your various letters concerning "errata" in the transcript.

I am reminded of the sage who said: "Thou seest the mote in the eye of thy brother but seest not the beam in thy own eye."

Why don't you disqualify yourself in this matter as your oath of office requires you to do.

Opinion

/s/ Kerpelman
Kerpelman

K/bg

cc: J. Martin McDonough, Attorney

The other letter is dated January 29. It "demand[s]" that no changes be made. It "also demand[s]" that if there are changes that the transcript be made to show "*what the reading was before [the judge] changed it and what the reading was after [he] changed it.*" (Emphasis Kerpelman's.) The record makes abundantly plain the bases for change.

The following are a few examples selected at random from the various changes proposed by Judge Levin:

DATE	PAGE	LINE	AS IN TRANSCRIPT	SHOULD BE
5/22/79	42	19	Mosher	Moser
5/23/79	271	13	Slicker	Slicher
6/13/79	88	24	to	too
6/19/79	147	4	aggitated	agitated
7/16/79	80	12	or	are
9/7/79	6	7	epitapha	epithets
9/10/79	108	8	affect	effect
9/10/79	108	10	insistance	insistence

This contention is without merit.

34–"[A]buse of, and a denial of Due Process"

In this exception Kerpelman contends:

34. It is an abuse of, and a denial of Due Process to have the fact inquiry made by reference, in effect, to a master, and the question of disposition performed by this court; it is only in the course of a full-fledged fact finding inquiry that the true context, coloration, background, and proper inferences relating to disposition

can be acquired; the procedure being used here is therefore invalid.

This is yet another of his contentions for which Kerpelman cites no authority.

For generations in proper circumstances, courts, state and federal, including the Supreme Court of the United States, have made use of masters who have heard the evidence after which the ultimate disposition has been made by the court. This contention is without merit.

35–Denial of due process by the extent of the proceedings

In this exception Kerpelman contends:

35. The proceedings were so protracted, expanded, and enlarged, particularly by bringing in collateral and other inadmissable [sic] issues, that the court is now presented with a transcript which it is believed is so long that members of this Court will not read it and the case will be decided not only on the evidence presented, but on the so–called findings of Levin; and these are distortions; and the Respondent is denied thereby Due Process of law.

As these exceptions illustrate, if these proceedings have been unduly "protracted, expanded, and enlarged," to a large degree this is the work of Mr. Kerpelman. Although he has raised myriad issues in his exceptions, many of which are frivolous, to put it mildly, he has made no reference to one very important issue which we shall discuss later in this opinion.

The contention is without merit.

36–This Court's rule making power

[14] In this exception Kerpelman states:

> 36. This Court's rule making power in this area was a wrongful usurpation of legislative power, and was unlawful; or it was an unlawful delegation by the legislature to this court; in either case it is a denial of Due Process as well as an unlawful exercise of power to determine who shall practice law. Note that the legislature has designated the oath of office for attorneys and it is for the legislature alone to set standards. This court, in addition, bears its own bias and prejudices as to how law should be practiced and has induced these biases and prejudices into, and read them into the proceedings herein, which it has no lawful right to do, and the proceedings are invalid.

Again, no authority is cited for the contention. The superintending power of courts over their bars is deeply ingrained in the system of law which we inherited from our forebears at the time of the American Revolution. It has continued to this day. The contention is without merit.

37–40, inclusive–Findings were arbitrary and capricious, against the evidence, against the weight of the evidence, and not based on clear and convincing evidence

[15] We hold to the contrary. We find clear and convincing evidence to support the conclusion of Judge Levin that Kerpelman escalated his fee in the Malcomb matter, that Kerpelman misrepresented to Malcomb that there remained work to be done

on Malcomb's case, and that Kerpelman suggested to his client that in violation of a decree of the Circuit Court for Anne Arundel County (of which Kerpelman had knowledge) that the client physically remove his child from the custodian under the decree, the child's mother. Accordingly, we find clear and convincing evidence of violation of DR 1-102(A)(1) (relative to violating a disciplinary rule), DR 1-102(A)(4) (relative to engaging in conduct involving dishonesty, etc.), DR 1-102(A)(5) (relative to engaging in conduct prejudicial to the administration of justice) and DR 1-102(A)(6) (relative to other conduct adversely reflecting upon an individual's fitness to practice law).

We shall leave to our discussion under Part V of this opinion the question of whether Kerpelman's conduct in the matter of the child amounted to a violation of DR 1-102(A)(4) (engaging in conduct involving dishonesty, fraud, deceit, or misrepresentation), DR 1-102(A)(5) (engaging in conduct that is prejudicial to the administration of justice), DR 1-102(A)(6) (engaging in any other conduct that adversely reflects on his fitness to practice law); DR 7-102(A)(7) (to the effect that a lawyer shall not counsel conduct the lawyer knows to be illegal) and DR 7-106(A) (concerning advising a client to disregard a ruling of a tribunal made in the course of a proceeding).

41-Charges added after trial began

In this contention Kerpelman says:

41. Charges were added and adduced over and against the Respondent after the trial was begun contrary to the re-

quirements of *Bar Association v. Cockrell*, 270 Md. 686, 313 A.2d 816 (1974).

As our previous discussion of the allegations against Kerpelman and the findings by the trial judge will reflect, Judge Levin's finding of clear and convincing evidence of violations of the disciplinary rules applied to no charge added after the petition for disciplinary action was initially filed in this Court. Hence, this is yet another frivolous contention.

42–Kerpelman's memorandum

This exception is based upon what Kerpelman calls "[Judge] Levin's failure to regard [sic] Respondent's Memorandum filed below." He does not elucidate. Thus we do not know to what memorandum he refers. He filed a number of memoranda. We can only say that from a detailed, careful examination of the record and transcript we find that Judge Levin gave commendably patient, careful, courteous and detailed consideration to each and every contention advanced by Kerpelman, no matter how frivolous the contention might have been or how irritating or discourteous Kerpelman's manner in advancing his contention might have been.

43–Ex post facto

[16] In this exception Kerpelman says:

> 43. The present proceedings are being carried on under what amounts to an *ex post facto* law; the Respondent should have been proceeded against under the old Canons of Professional Ethics.

Yet again, the basis of the contention and the authority therefor is not specified.

Opinion

Rule BV1 j defines "misconduct" as "an act or omission by an attorney, individually or in concert with any other person or persons which violates the Disciplinary Rules of the Code of Professional Responsibility as adopted by Rule 1230 . . . ." That Code, appearing as Appendix F of the Maryland Rules, was adopted October 13, 1970. There have been but two amendments since then, one on December 9, 1976, effective January 1, 1977, as result of the Report and Recommendations of the Special Commission to Study Prepaid Legal Service Plans in Maryland, and another on March 8, 1978, effective May 1, 1978, pertaining to lawyer advertising. Those amendments are not involved in this case. The instances in question here all took place subsequent to 1970. Accordingly, this contention likewise is without merit.

44–Tax

In this exception Kerpelman states:

> 44. The present proceedings were brought and supported under a provision of the Rules of this court laying a tax on members of the legal profession as a requirement of practicing law; only the Legislature can lay or levy a tax; the proceedings therefore are invalid.

[17] He obviously is referring to the fact that Rule BV2 creating the Attorney Grievance Commission provides for the establishment of the Disciplinary Fund. Members of the Maryland Bar are required to contribute annually to it "as a condition precedent to the practice of law" at the same time they pay the sums required un-

der Rule 1228 establishing the Clients' Security Trust Fund. The operations of the Attorney Grievance Commission and the office of Bar Counsel are financed from this fund.

In re Member of Bar, 257 A.2d 382 (Del. 1969), *appeal dismissed sub nom. In re Reed*, 396 U.S. 274, 90 S.Ct. 562, 24 L.Ed.2d 464 (1970), concerned a similar attack upon Delaware's clients' security trust fund. In rejecting such a contention Chief Justice Wolcott said for the Supreme Court of Delaware, "The short answer to this contention is that the payment required is an assessment and not a tax". *Id.* at 385. This may or may not be correct, but even if Kerpelman's point were well taken, it would not be an excuse for unethical conduct on the part of a member of the bar of this Court, nor would it be a defense to charges relative to such conduct.

V Legal effect of counseling violation of a court decree

It will be recalled that DR 7-102(A)(7) states that in his representation of a client a lawyer shall not counsel or assist his client in conduct which the lawyer knows to be illegal. This is the principal disciplinary rule which Kerpelman was found by the trial judge to have violated when he gave advice relative to the child. Canon 7, to which this disciplinary rule is applicable, states that a lawyer should represent a client zealously within the bounds of the law.

Kerpelman at oral argument before us opened with a reference to the oath of an

attorney when admitted to practice in this Court, focusing on that portion of Code (1957) Art. 10, § 10 in which an attorney says:

> I do solemnly swear (or affirm) that . . . I will bear true allegiance to the United States, and that I will support, protect and defend the Constitution, laws and government thereof as the supreme law of the land; any law or ordinance of this or any State to the contrary notwithstanding.

He then said:

> An attorney is to make a judgment as to what rules, ordinances and statutes are unconstitutional and by his Maryland oath of office set forth by the Maryland Legislature, he is to place his opinion of the Constitution above the rules of this Court or an ordinance or statute.

He argued that pursuant to his oath it would be permissible for an attorney to advise a client to violate a court order he deemed constitutionally invalid.

[18] The conventional wisdom of the courts and the legal profession has been that a lawyer may not advise his client to violate a law or court order, except in the instance of a test case where there is a good faith belief that the statute or order may be invalid. *See, e. g.*, EC 7–1; EC 7–2; EC 7–3; EC 7–5; EC 7–22; former Canon 16; former Canon 32; A.B.A. Project On Standards for Criminal Justice, Standards Relating to the Defense Function § 3.7 (approved draft 1971); Cowen, *The Lawyer's Role in Civil Disobedience*, 47 N.C.L.Rev. 587, 592–

93 (1969); H. Drinker, *Legal Ethics*, 150, 152 (1953); *Maness v. Meyers*, 419 U.S. 449, 458–60, 468, 95 S.Ct. 584, 590–92, 596, 42 L.Ed.2d 574 (1975); *Chapman v. Pacific Tel. & Tel. Co.*, 613 F.2d 193, 197 (9th Cir. 1979); *In re Grand Jury Proceeding*, 601 F.2d 162, 169 (5th Cir. 1979); *United States v. Dickinson*, 465 F.2d 496, 512 (5th Cir. 1972); *Odell v. Bausch & Lomb Optical Co.*, 91 F.2d 359 (7th Cir. 1937); *Snyder v. State Bar*, 18 Cal.3d 286, 133 Cal.Rptr. 864, 555 P.2d 1104 (1976); *In re Mekler*, 406 A.2d 20 (Del. 1979); *Committee on Professional Ethics, Etc. v. Crary*, 245 N.W.2d 298, 307 (Iowa 1976); *In re Marietta*, 223 Kan. 11, 569 P.2d 921 (1977); *In re Daly*, 291 Minn. 488, 489, 495, 189 N.W.2d 176 (1971); *In Matter of Johnson*, 597 P.2d 740 (Mont.1979); *In re Cooley*, 95 N.J.Eq. 485, 490, 125 A. 486 (1924), *aff'd* 103 N.J.Eq. 377, 143 A. 916 (1928); *In re Hittson*, 20 N.M. 319, 325, 326, 150 P. 733 (1915); *Territory v. Clancy*, 7 N.M. 580, 37 P. 1108 (1894); *In re Apfel*, 202 App.Div. 76, 195 N.Y.S. 325, 328 (1922); *In re Clostermann*, 276 Or. 261, 263, 554 P.2d 467 (1976); and *Ex parte Miller*, 37 Or. 304, 60 P. 999 (1900).

[19] In this instance Kerpelman has not articulated an argument that the decree was constitutionally infirm. In fact, there is not the slightest suggestion of any infirmity in the Draper custody decree. This was no test case nor did the custody order compel the surrender of any constitutional right.

As to Kerpelman's argument that he did not commit the act alleged, we point out that Judge Levin said:

Opinion

I find as a fact that in August, 1976, Respondent did suggest to his client, in flat violation of the Decree, that he (Draper) physically take the child from the Syracuse residence where she was living with her mother; that it was Respondent's and not Draper's suggestion that Respondent told Draper to not make it look like a breaking and entering but just to get the child; that if it was successful, "we" might get a faster response from the court and it would show good concern on Draper's part; and that Respondent told Draper not to say anything to anybody about it. I find further that the idea of taking [Marlene's estranged husband] and the two men was Draper's, not Respondent's (but that Draper's idea emanated directly from Respondent's suggestion that Draper not break in. Thus Draper took Marlene's estranged husband to trick her into opening the door).

* * * * * *

Respondent is obliged to admit that he advised any number of his clients to perform child snatches, yet he tried to expiate his admission by saying he only meant legal child snatches. By legal, he says he means taking your child *before* there is a court order. He acknowledges, however, he made an "unfortunate choice of words" and he further acknowledges that he is "not saying that it (child snatch) cannot cover an illegal one." His explanation is fanciful and absurd. He is hoist by his own petard.

> It is interesting to note that when Draper testified at the March 23, 1977 hearing as to why he snatched the child, he testified that *he went on Respondent's advice*. Thus Draper's exact same version was given before Judge Beardmore [in the child custody hearing in the Circuit Court for Anne Arundel County] *at a time when there was no complaint by him against Respondent*, the same version was given before the Inquiry Panel; and the same version was given in instant case. Draper's testimony is entirely consistent and credible as opposed to the testimony of Respondent—testimony which is riddled with self–contradiction, inconsistency and illogic. [(Emphasis in original.)]

We have already held that there was clear and convincing evidence to support these findings.

The courts were open for a petition for a change of custody, as Kerpelman well knew, having prepared such a petition. If people are permitted to pick and choose which orders of court they proposed to obey, our legal system will soon disintegrate and our government of laws will be replaced by anarchy.

We conclude, therefore, that Kerpelman's conduct in the matter of the child amounted to a violation of DR 1–102(A)(4) (a lawyer shall not engage in conduct involving dishonesty, fraud, deceit, or misrepresentation), DR 1–102(A)(5) (a lawyer shall not engage in conduct that is prejudicial to the

administration of justice), DR 1-102(A)(6) (a lawyer shall not engage in any other conduct that adversely reflects on his fitness to practice law), DR 7-102(A)(7) (a lawyer shall not counsel conduct which he knows to be illegal) and DR 7-106(A) (a lawyer shall not advise a client to disregard a ruling of a tribunal made in the course of a proceeding), as well as DR 1-102(A)(1) (a lawyer shall not violate a disciplinary rule).

VI Sanctions

There have been no disciplinary actions against Kerpelman in this Court in which he has been adjudged in violation of any of the Disciplinary Rules. Bar Counsel has not advised us of any disciplinary actions in trial courts prior to our assuming jurisdiction of such matters in which Kerpelman was found to have violated the Disciplinary Rules nor has he advised us of any reprimands. Thus, his prior professional record appears to be unblemished. Many times in recent years this Court has quoted from *Ex parte Brounsall*, 2 Cowp. 829 (1778), what has come to be known as "The Lord Mansfield Rule." It is to the effect that in disciplinary proceedings the inquiry is to whether after the conduct of such individual it is proper that he should continue to be a member of a profession which should stand free from all suspicion, such proceedings not being by way of punishment, but the court in such cases exercises its discretion whether a person whom they have formerly admitted to practice is a proper person to be continued on the roll or not. By the same token, a suspension is for the

protection of the public, not by way of punishment of the individual lawyer. It protects the public because it demonstrates to members of the legal profession the type of conduct which a court will not tolerate.

We have before us three separate violations of the Disciplinary Rule: the matter of the Malcomb fee, the matter of the statement to Malcomb that his custody matter had not been concluded when in fact it had been, and the matter of the advice relative to retrieval of Draper's child in disregard of a court order.

Kerpelman's conduct in the matter of his fee and his misrepresentation to his client of the then posture of the proceedings pending in the Circuit Court for Baltimore County represents a type of conduct against which the public is entitled to protection, conduct which brings the legal profession into disrepute. It reflects adversely upon the courts since lawyers are officers of the courts. We have here a finding by the trier of fact that Kerpelman made a wilful misrepresentation to Malcomb as to his fee and that he maliciously and improperly escalated his fee charges to Malcomb without any basis, without any agreement, without any warning, and without the escalated charges bearing any relationship to the amount of work done. We likewise have a conclusion that Kerpelman deliberately misrepresented to Malcomb that there remained work to be done on the case and that Kerpelman was actually engaged in performing such work when no work remained to be done, a misrepresentation made to justify an improper fee.

Although one may infer from the proceedings here that the Draper matter is not the first and only instance in which Kerpelman had advised self-help on the part of his clients in disregard of a court order, such other instances may not be used in determining the sanction, he not having been charged with them. *Bar Ass'n v. Cockrell*, 270 Md. 686, 313 A.2d 816 (1974). If Kerpelman were charged with multiple violations of court orders in child custody or other matters under circumstances similar to the case at bar and such charges were proved, we would disbar him forthwith without hesitation. Such contumacious conduct on the part of an officer of the court sworn to uphold the law cannot be tolerated.

We conclude that the proper sanction to be imposed here, taking into account all of Kerpelman's misconduct, is a suspension of two years. Therefore, Leonard Jules Kerpelman shall stand suspended from the practice of law in this State for the period of two years accounting from thirty days from the date of this opinion. He shall stand suspended beyond that date unless and until all costs incurred in connection with this proceeding are paid in full.

IT IS SO ORDERED; RESPONDENT SHALL PAY ALL COSTS AS TAXED BY THE CLERK OF THIS COURT, INCLUDING THE COSTS OF ALL TRANSCRIPTS, PURSUANT TO MARYLAND RULE BV15 c FOR WHICH SUM JUDGMENT IS ENTERED IN FAVOR OF THE ATTORNEY GRIEVANCE COMMISSION